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733-386—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1070

CARLOS MARCELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 31–32) is reported at 328 F. 2d 961. The opinion of the district court (Pet. 19–30) is reported at 210 F. Supp. 892. An earlier opinion of the district court is reported at 202 F. Supp. 694.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1964. On April 13, 1964, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including May 11, 1964. The petition was filed on May 5, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, who pleaded guilty, may challenge his conviction in a coram nobis proceeding on the ground that he was entrapped into transferring marihuana.

2. Whether petitioner sustained his burden of demonstrating that he had not been represented by counsel when he pleaded guilty and was sentenced.

STATEMENT

On March 26, 1938, petitioner, who had been arrested on a charge of illegal transfer of marihuana, appeared before a United States Commissioner with an attorney named Fred Middleton (R. 306, 316). On May 2, 1938, after an indictment charging petitioner with the illegal transfer had been returned, petitioner, who then appeared with Warren O. Coleman as his attorney, pleaded not guilty (R. 9). On June 6, 1938, petitioner's case was continued indefinitely (R. 153). On Saturday morning, October 29, 1938, petitioner appeared before Circuit Judge Rufus E. Foster, sitting in the district court, changed his plea to guilty, and was sentenced to imprisonment for a year and a day. The judgment recites that petitioner appeared in person and by counsel (R. 6–7), and the relevant minute entry names Warren O. Coleman as petitioner's counsel at the time of the guilty plea and sentence (R. 16).

In 1952, proceedings were instituted to deport petitioner on the basis of his 1938 conviction. *Marcello* v. *Ahrens*, 212 F. 2d 830 (C.A. 5), affirmed, 349 U.S. 302. After being deported, petitioner re-entered the

United States (see *Marcello* v. *Kennedy*, 312 F. 2d 874 (C.A.D.C.)), and a second order of deportation was entered in 1961 (R. 10).

In September 1961, petitioner filed a petition for a writ of *coram nobis* to set aside his 1938 conviction (R. i-ii). He claimed therein that his conviction was invalid because he had not been represented by counsel and had not waived the assistance of counsel when he pleaded guilty. He also asserted that he had been entrapped into committing the offenses (R. 4-5, 8-16).

The evidence presented at the district court hearing on the assistance-of-counsel contention is detailed in the opinion of the district court (Pet. 19-30). Petitioner testified that after arraignment he did not again see Mr. Coleman, that he could not afford an attorney, and that he entered a guilty plea after being told by his uncle that he had arranged for him to receive a sentence of less than a year on such a plea (R. 307-308, 343). Former United States Probation Officer Seidler testified that he recalled a Saturday morning in 1938 when petitioner was sentenced for a narcotics violation and that he remembered that petitioner was not represented by Mr. Coleman or by any other attorney (R. 172-175). He said that he remembered this incident because it was unusual to sentence a defendant without advising him of his right to counsel (R. 209-210). A friend of petitioner testified that he accompanied petitioner on that occasion and that he did not see Mr. Coleman in court (R. 182).

The Assistant United States Attorney who prosecuted the case, now Circuit Judge J. Skelly Wright, was a government witness. He had no independent

recollection of the arraignment. He identified his signature on a routine parole report concerning petitioner, dated October 29, 1939, in which it was stated that petitioner was represented by Mr. Coleman at the time of his plea. Judge Wright testified that he would not have written in the report that an attorney was present if petitioner had not been represented at the time of his plea (R. 414–418, 424). Judge Wright also testified that it was the custom of the United States Attorney's Office to prepare the judgment for the court's signature. He said that had petitioner been unrepresented, he would have made a notation to that effect on the judgment as per instructions from the Department of Justice (R. 419–421). The then First Assistant United States Attorney, now District Judge Herbert W. Christenberry, testified that it had been the office's practice to advise any defendant who appeared without an attorney that the court would appoint an attorney for him (R. 443–444). The government also introduced evidence that after petitioner's guilty plea, Mr. Coleman's law firm again represented petitioner in a civil tax matter arising out of possession of the marihuana (R. 376–378).

The district court denied petitioner's motion (R. 13–30). It found that petitioner had failed to overcome the strong presumption of regularity in the judgment. In weighing the testimony of the parole officer, the court stated: "We cannot accept as true this attempted recollection of events of nearly a quarter of a century ago, when other important details attending the day of the guilty plea and subsequent parole supervision are completely lacking" (R. 21–22).

The court also rejected the testimony of petitioner and his friend. The court of appeals affirmed.

ARGUMENT

1. Petitioner may not belatedly litigate an entrapment defense in a collateral attack on his 1938 conviction. *Sunal* v. *Large*, 332 U.S. 174; *Simmons* v. *United States*, 302 F. 2d 71 (C.A. 3); *United States* v. *Spadafora*, 200 F. 2d 140 (C.A. 7); *Turner* v. *United States*, 262 F. 2d 643 (C.A. 8); *Ellison* v. *United States*, 283 F. 2d 489 (C.A. 10), certiorari denied, 365 U.S. 885. Moreover, his plea of guilty foreclosed any such defense. *Kaye* v. *United States*, 235 F. 2d 187 (C.A. 6). *Banks* v. *United States*, 249 F. 2d 672 (C.A. 9), relied upon by petitioner (Pet. 6), is not to the contrary, for it concerned a conviction after a trial at which the defendant had pleaded not guilty and had admitted commission of the offense only because his attorney misled him into believing that an entrapment instruction would be requested. Both before and after that decision, the Ninth Circuit held expressly that entrapment is not a cognizable ground for vacating a conviction in a collateral proceeding. *Black* v. *United States*, 269 F. 2d 38, 42 (C.A. 9); *Stanley* v. *United States*, 239 F. 2d 765 (C.A. 9).

2. Petitioner acknowledges that the burden rested upon him to prove that he did not have counsel at arraignment. The finding of the district court that petitioner had not sustained his burden, which was affirmed by the court of appeals, does not require further review by this Court. Both the sentencing

judge and the attorney who was recorded as having appeared on petitioner's behalf were dead at the time of the hearing (R. 176–177). The lapse of twenty-five years had naturally affected the memories of all living witnesses. The trial judge properly concluded, therefore, that petitioner's burden was "affected and magnified by the lapse of time" (Pet. 22). The remarks in *United States* v. *Morgan*, 222 F. 2d 673 (C.A. 2), and in *McKinney* v. *United States*, 208 F. 2d 844 (C.A.D.C.), upon which petitioner relies (Pet. 8–9), do not relate to the burden of proof but merely state the proposition that a void conviction is subject to collateral attack even after the passage of a substantial period of time.

The evidence offered by the government was properly received. The testimony of Judges Wright and Christenberry regarding the 1938 practice relating to guilty pleas was relevant to the issue raised by petitioner. See *United States* v. *Castelli*, 306 F. 2d 640 (C.A. 2), certiorari denied, 371 U.S. 921; *United States* v. *Di Martini*, 120 F. Supp. 907 (S.D.N.Y.), affirmed, 219 F. 2d 807 (C.A. 2). Involved in this case was the practice in the Eastern District of Louisiana, not elsewhere.[1] Nor is there merit to petitioner's contention that the court should have disregarded

[1] Petitioner claims that the government brief in *Walker* v. *Johnston*, No. 173, Oct. Term 1940, reveals a practice of not appointing counsel where a defendant pleads guilty (Pet. 15). It is true that the government argued in that case that there was a constitutional right to counsel only if the defendant needed aid, a need not usually present if there is a guilty plea. But the brief does not suggest that it was customary practice to deny the assistance of counsel if a guilty plea was expected.

the reference in the judgment to the presence of counsel because the presumption of regularity was rebutted by the erroneous filing date of October 28, 1938 (Pet. 11). The error as to date, does not reflect on the judgment's recital that petitioner had counsel, which was corroborated by the usual practice of the office and the fact that the same attorney later represented petitioner in another related matter.[2]

The fact that the parole report was not formally introduced into evidence (Pet. 11) is without significance. Judge Wright testified as to so much of its contents which bore on the question whether petitioner had counsel (R. 413–422, 437), and he was cross-examined on this report (R. 424–426, 436). The exhibit was, therefore, properly before the court, and it could be considered as if it had been formally admitted into evidence.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[2] In any event, a figure "9" was written either over or under the "8" in "October 28." An expert was unable to determine which figure had been written first (R. 459–466).

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